In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 814

W. M. DANIELS, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND GREAT NORTHERN RAILWAY COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, BUTTE DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees, United States of America and Interstate Commerce Commission, move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court, dated October 29, 1962, dismissing an action brought by appellant to set aside an order of the Interstate Commerce Commission.[1] The order rejected appellant's statement of

[1] Appellant's petition for rehearing and motion for a new trial were denied on December 14, 1962 (J.S. 41–43).

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intent (predicated upon Section 206(a)(1) of the Interstate Commerce Act) to engage in the transportation of property in interstate or foreign commerce within the State of Montana in operations corresponding to those authorized in his Montana Interstate Permit.

Prior to enactment of the Motor Carrier Act of 1935 (49 U.S.C. 301, *et seq.*), appellant obtained a certificate from the Montana Board of Railroad Commissioners authorizing various interstate, as well as intrastate, operations. By various conveyances, appellant has, over the years, disposed of all of his authorities except one reissued interstate permit described as follows (Interstate Permit M.R.C. No. 284 (reissued)):

> to transport property as a common carrier in Interstate service, Class A, by motor vehicles for hire over and on the public highways of the State of Montana, between Missoula, and Helena, Montana; between Missoula and Miles City, Montana, via Butte; and between Butte and Great Falls, Montana, * * *.

Appellant possesses no intrastate authority of any kind and conducts no operations under the above state permit. On December 31, 1938, appellant sought registration of his Montana interstate permit[2] with the Interstate Commerce Commission, relying upon the second proviso of Section 206(a)(1) of the Act. It was rejected. (Docket No. MC–54469 (Sub-No. 1).) On March 8, 1957, and February 3, 1958, appellant

[2] A 1943 reissue of this certificate is involved in this proceeding.

again sought registration of his interstate permit pursuant to the second proviso of Section 206(a)(1) of the Act. These applications were also rejected. On January 23, 1959, the Commission instituted an investigation to determine appellant's eligibility under the second proviso. The examiner found that appellant was not eligible to conduct interstate operations.

On exceptions, Division 1 of the Commission adopted the recommendations of the examiner and held that appellant had failed to establish that operations in interstate commerce corresponding to his Montana certificate would fall within the second proviso of Section 206(a)(1), and accordingly concluded that appellant's Statement of Intent to operate in interstate commerce should be disapproved and rejected. This decision is reported at 88 M.C.C. 357, and is reprinted in the appendix hereto. The ground of the decision was that the second proviso applies only to "intrastate" as opposed to "interstate" certificates. The decision of the three-judge court adopts the same view.

ARGUMENT

The decision below is clearly correct and presents no question of substantial or continuing importance. We submit, therefore, that the judgment of the court below should be affirmed.

Section 206(a)(1), as it read prior to its general revision in 1962, required a certificate of public convenience and necessity for motor carriers operating in interstate commerce, but contained two provisos. The first of these (not involved here) related to

"grandfather" operations. The second proviso stated:

> *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board.

Appellant's argument is a strictly literal one. He says that the antecedent of the words "such certificates" is the phrase "a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce." As a matter of syntax, this is a permissible reading. As a matter of common sense and of history, it is not. In our view, "such certificates" must be read to refer to a certificate of public convenience and necessity of the kind which the States are authorized to grant, *i.e.*, a certificate for intrastate operations.

Well before the passage of the Motor Carrier Act in 1935, this Court had settled the proposition that an individual State, though empowered to regulate the use of its highways in the interests of safety and conservation, had no authority to regulate the conduct of interstate commerce upon those highways. *Buck* v. *Kuykendall,* 267 U.S. 307, 314–315. In enacting the federal regulatory statute, Congress "adopted a comprehensive plan for regulating the

carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce." *Castle* v. *Hayes Freight Lines,* 348 U.S. 61, 63. So far as State Boards (or Commissions) were concerned, Congress explicitly defined them as bodies having jurisdiction to grant certificates "or otherwise to regulate the business of transportation by motor vehicles, in intrastate commerce." Section 203(a)(2), 49 U.S.C. 303(a)(2).

Appellant's argument would produce an absurd result. The Interstate Commerce Commission would be required to register a carrier as having authority to perform interstate transportation between points within a single State if that State had ostensibly conferred authority to perform such interstate transportation (authority which the States were not empowered to grant and which state statutes, with rare exception, do not assert), but would not be in a position to register carriers possessing certificates of the only kind which the States conventionally issue (certificates authorizing intrastate carriage).

The purpose of the second proviso of Section 206 (a)(1) is obvious. Motor carriers frequently connect with one another and interline traffic. Thus, in some circumstances and on some occasions, a carrier operating solely within a single State may be engaged in interstate commerce. Congress was of the view that local carriers authorized by State Boards should not be required, however, to go through federal certifica-

tion proceedings to cover transportation which was "interstate" only because of its connection with the operations of another carrier. Certainly, it is apparent from the entire scheme of the federal Act that Congress was not proposing to make it a state function to issue certificates for interstate operations.

The consistent administrative interpretation confirms this view. Since 1936, the Commission has consistently construed the Act as requiring presentation of a state-issued intrastate authority, rather than a state certificate purporting to grant interstate authority. As the court also noted (J.S. 32), this interpretation was set forth in 1937 in a Commission ruling,[3] and was subsequently upheld by a district court[4] on the only occasion that the issue was directly presented.[5]

As the above makes clear, the issue is not a recurrent one. More than that, however, the 1962 revision of Section 206(a)(1) (J.S. 47–52), which establishes a new method of issuing interstate authority to intrastate carriers, places it beyond dispute that the right to engage in interstate transportation within a State under that Section turns on the State's issuance of

[3] The ruling was elaborated in *Gulf Coast Motor Freight Lines, Inc., Common Carrier Application*, 3 M.C. 497, 500, affirmed, *Gulf Coast Motor Freight Lines, Inc.* v. *United States*, 35 F. Supp. 136 (S.D. Tex.).

[4] *United States* v. *Union Pacific R. Co.*, 20 F. Supp. 665 (D. Idaho).

[5] *Oswega Transportation Lines* v. *Feinberg*, 181 N.Y. Supp. 2d 1007, contains dicta supporting appellant's position, but, as the court below pointed out, the issues in that case were quite different (J.S. 34–35).

"a certificate of public convenience and necessity authorizing motor vehicle common carrier operations in intrastate commerce" (J.S. 47–48).

It remains only to add that Congress did not regard the amendment as effectuating any change of law in the respect material to this case. The relevant committee report (S. Rep. No. 528, 87th Cong., 1st Sess., pp. 1–2) stated:

> The existing second proviso of Section 206 (a)(1) of the Interstate Commerce Act enables motor common carriers whose operations are confined to a single State and who have been granted a certificate to allow operation within the State from their State regulatory bodies, to also engage in operations in interstate and foreign commerce. Such operations in interstate and foreign commerce must, of course, be carried on entirely within the State in which the motor carrier is certificated to operate.
>
> At present the right to engage in interstate or foreign commerce by an intrastate carrier is automatically obtained by filing its State certificate with the Interstate Commerce Commission. The carrier by such filing is then authorized to engage in interstate or foreign commerce to the same extent that the carrier is authorized to engage in intrastate commerce as described in the particular State certificate filed with the Commission.

In summary, the issue is narrow, the decision below clearly correct and the law for the future settled by statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

Respectfully submitted.

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MARCH 1963.

APPENDIX

INTERSTATE COMMERCE COMMISSION

No. MC–C–2507

W. M. DANIELS—INVESTIGATION OF SECOND PROVISO ELIGIBILITY

Decided November 21, 1961

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS WALRATH, WEBB, AND TUCKER

WEBB, *Commissioner:*

Exceptions to the order recommended by the examiner were filed by W. M. Daniels, hereinafter called respondent; and the Bureau of Inquiry and Compliance, Interstate Commerce Commission, Great Northern Railway Company, Consolidated Freightways Corporation of Delaware, and Northwest Freight Lines, Inc., hereinafter referred to by abbreviated names, replied.

By a statement (form BMC–75) submitted to the Commission on February 3, 1958, respondent, of Butte, Mont., the holder of interstate permit M.R.C. 284 (reissued),[1] issued to him by the State of Montana, Board of Railroad Commissioners, on March 8,

[1] An abstract of the pertinent portions of this permit appears in the appendix to this report.

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1943, gave notice of his intent to engage in the transportation of property, in interstate or foreign commerce in Montana under the second proviso of section 206(a)(1)[2] of the Interstate Commerce Act, in operations corresponding to those authorized in the Montana permit.

By order entered January 23, 1959, division 1, on its own motion, instituted an investigation to determine (1) the acceptability of such filing, and (2) whether respondent may lawfully engage in for-hire transportation, in interstate or foreign commerce, within the State of Montana under the second proviso of section 206(a)(1) of the act, in operations corresponding to those authorized in the Montana permit. By order of May 23, 1960, the matter was assigned for handling under the modified procedure, and the statement of facts contained in a joint stipulation of the Bureau and respondent was received in evidence. The Bureau, Great Northern, Consolidated, and Northwest oppose the registration. The Board of Railroad Commissioners of the State of Montana, hereinafter called the board, appeared to state its position with regard to respondent's Montana permit.[3]

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[2] "*And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.".

[3] The words "permit" and "certificate" are used interchangeably by the board, and the permit will hereinafter be referred to as a certificate.

The examiner found that the aforementioned certificate 284 was not acceptable for filing under the second proviso, and that respondent could not lawfully engage in operations in interstate or foreign commerce, pursuant to such certificate. The salient facts are adequately set forth in the examiner's report, and need not be repeated in detail in this report.

On July 21, 1933, the board issued to respondent a certificate in the same form as the one involved here, covering operations between Missoula, Butte, and Helena, Mont. Later, on December 19, 1933, a similar certificate was issued for operations between Butte and Miles City. These operations were consolidated in one certificate dated September 24, 1934. On January 5, 1935, an additional point, Great Falls, was authorized and at that time a certificate substantially similar to the one involved here was issued. The certificate in such form was reissued on January 22, 1936. When reissued on March 8, 1943, the board's order included the statement:

> This order is made merely for the purpose of correcting the form of said certificate No. 284 previously issued on January 22, 1936, by proper segregation and for no other purpose, and shall not be considered as a passing on or a determination of the rights of the holder of said certificate as originally issued, or by operation thereunder.

On May 18, 1951, the board canceled respondent's certificate, without notice or opportunity for hearing. This action was reversed by the Montana Supreme Court in *State* v. *Board of Railroad Commissioners*, 131 Mont. 9, 306 P. (2d) 264 (1957). The board was directed to reinstate the certificate because the Montana court held that lack of notice and hearing vio-

lated due process of law. Respondent conducts no operations under the certificate.

Attempted registrations of his certificate under the second proviso on December 13, 1938, March 1957, and February 3, 1958, were rejected by the Commission or Commission representatives. The stated reason for rejection was that the second proviso applies only to "intrastate" certificates and not "interstate" certificates as here involved. The examiner's conclusions in the instant proceeding are based on the same ground.

CONTENTIONS OF THE PARTIES

Here, in his brief and on exceptions, respondent contends that the certificate is within the purview of the proviso; that his Montana certificate is an express grant of authority based on a showing of public convenience and necessity; and that considering that the certificate was issued prior to passage of the Motor Carrier Act of 1935 on August 9, 1935, interstate operations may be conducted under the certificate.

The Bureau, in its reply, contends that the prior administrative determinations and findings are correct; that the State of Montana could not decide for itself which carriers were or were not to engage in interstate operations, since such regulation is in violation of the Commerce Clause of the Constitution of the United States; and that the examiner's findings should be upheld. Great Northern contends that the Montana certificate, as a matter of Montana law, was not issued under a showing of public convenience and necessity, and that, therefore, such certificate is not within the proviso. Consolidated and Northwest, in joint pleadings, contend that the lack of operations precludes a registration of the certificate. The board, in its brief, states that prior to the Motor Carrier Act

of 1935, interstate certificates were issued by it on a showing of public convenience and necessity; and that although it considers such certificates of no effect, it is bound by the decision of the Montana Supreme Court with respect to respondent's certificate.

DISCUSSION AND CONCLUSIONS

We must determine whether or not respondent may operate in interstate or foreign commerce pursuant to registration of his Montana certificate under the second proviso. Since respondent's certificate dated March 8, 1943, was effective prior to the effective date of the Motor Carrier Act of 1935 we will consider it as having been issued prior thereto.

The language of the second proviso is somewhat ambiguous because of the phrase "if there be a board in such State having authority to grant or approve such certificates." Respondent contends that "such certificates" refers back to the immediate antecedent phrase "a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce." In *Gulf Coast Motor Frt. Lines, Inc., Com. Car. Application,* 3 M.C.C. 497, former division 5, in discussing the second proviso, said:

> Our administrative interpretation is, we think, supported and justified by sound rules of construction. Such construction requires a slight departure from the strict rules of grammar in ascertaining the antecedent of the words "such certificates" in the phrase "if there be a board in such State having authority to grant or approve such certificates." There is no difficulty in interpreting the word "certificates" as meaning certificates of public convenience and necessity because of the statutory definition in section 203(a)(5) and in its use elsewhere in

the act. The difficulty which we encounter, however, is in determining whether in the use of the words "such certificates" Congress intended certificates covering interstate commerce or certificates covering intrastate operations, since the immediate antecedent of the word "such" is the phrase "certificate of public convenience and necessity issued by the Commission authorizing such operations" and the ordinary rules of grammar usually require an interpretation of the word "such" as referring to its nearest antecedent.

The word "such" is defined by lexicographers as "of that kind; of the same or like kind; identical with or similar to something specified or implied; * * * being the same as what has been mentioned or indicated; being the same in quality; having the quality specified, etc." *In Re Hull*, 18 Idaho 475, 110 Pac. 256, 60 Corp. Jur. 986, *Words & Phrases*, 1st, 2d, 3d, and 4th series.

That the word "such," used in connection with "certificates," cannot mean "the same" or "identical with" is evident, because the certificate referred to in the forepart of section 206(a) is a particular certificate which can be issued only by the Interstate Commerce Commission. And since "such" cannot mean "the same" or "identical with" the particular certificate mentioned, we are compelled to accept other meanings of "such," viz., "similar to that specified" or "having the quality specified." The language of the condition of the proviso consequently becomes, paragraphed "if there be a board in such State having authority to grant or approve certificates of public convenience and necessity with respect to intrastate operations similar to those required by the Interstate Commerce Commission for interstate operations."

In *Buck* v. *Kuykendall*, 267 U.S. 307 (1925), the Supreme Court held that the State of Washington could not deny an applicant the right to use Washington highways in connection with interstate operations between Portland, Oreg., and Seattle, Wash., where such denial was based on economic grounds, or failure to show public convenience and necessity. The Supreme Court held that such economic regulation was forbidden by the Commerce Clause.

Thereafter, a Federal district court held that the State of Texas had no discretionary power to permit or to forbid interstate operations wholly within Texas, where the applicant was a connecting line carrier on interstate traffic. *Galveston Truck Line Corp.* v. *Allen*, 2 F. Supp. 488 (S.D. Tex. 1933). At page 489 the court stated:

> no difference in principle can, we think, be drawn between a link in interstate commerce which operates wholly within a State, and one which crosses the State line.

The district court allowed time for the issuance of a permit, but stated that in the absence thereof, the carrier could operate anyway. The Supreme Court cited *Buck* v. *Kuykendall, supra*, in its *per curiam* opinion affirming the lower court. *Allen* v. *Galveston Truck Line Corp.*, 289 U.S. 708 (1933).

Since the States could not regulate interstate or foreign commerce on economic grounds, it is clear that a State certificate of public convenience and necessity was not a condition precedent to interstate operations prior to the passage of the Motor Carrier Act of 1935. Insofar as respondent is concerned, interstate operations prior to the act could have been conducted without the Montana certificate. On the other hand, a certificate of public convenience and

necessity grants authority to perform operations which cannot be lawfully performed in its absence. The respondent does not hold such a certificate, and the document which purports to authorize interstate operations is a nullity unless the Congress intended the Commission to accept such documents for filing.

The Congress could have made State-issued interstate certificates eligible for filing under the second proviso as well as State certificates authorizing intrastate operations. Since the Congress' power over interstate commerce is plenary, we do not agree with the Bureau's contention that the Congress could not have recognized as valid in 1935, certificates which were of no force or effect when issued. No such intent, however, is reflected in the language of the statute. Moreover, no such intent is manifested in the legislative history of the Motor Carrier Act.

Some indication of a contrary intent is shown by the following definition of "State board" in section 203(a)(2) of the act.

> The term "board" or "State board" means the commission, board, or official (by whatever name designated in the laws of a State) which, under the laws of any State in which any part of the service in interstate or foreign commerce regulated by this part is performed, has or may hereafter have jurisdiction to grant or approve certificates of public convenience and necessity or permits to motor carriers, or otherwise to regulate the business of transportation by motor vehicles, in intrastate commerce over the highways of such State.

The phrase "to grant or approve certificates of public convenience and necessity * * * in intrastate commerce" should be read *in pari materia* with the second proviso phrase "to grant or approve such certificates." We interpret the language in the pro-

viso to mean "to grant or approve certificates of public convenience and necessity in intrastate commerce." A similar conclusion was reached in the *Gulf Coast* case, *supra*. That proceeding involved an attempted registration of a Texas interstate permit issued on grounds other than public convenience and necessity subsequent to the passage of the Motor Carrier Act. Former division 5 rejected the filing because it was an "interstate" permit saying:

> Review of the legislative history of the proviso is a proper resort in this case for the ascertainment of the intent of Congress, since the language is not entirely free from ambiguity. The measure which became the Motor Carrier Act, 1935, was proposed in the report of the Federal Coordinator of Transportation of January 21, 1935, as appendix VII of the bill which was introduced as S. 1629. It was, in fact, a revision of the former motor-carrier bill submitted by the Coordinator in his earlier report of March 19, 1934, which in its turn was based largely upon the Rayburn Bill then under consideration by Congress. An examination of the Rayburn Bill indicates that it was drawn upon the theory that the Federal Government would not exercise any jurisdiction over carriers operating between points in the same State, even though they were engaged in transporting persons or property in interstate commerce. In the hearings upon that bill before the House committee the definition of interstate commerce in the bill was criticized in respect to its exclusion of commerce physically intrastate but actually interstate, as being an attempt by legislative fiat to change interstate commerce into intrastate commerce. It was suggested that the bill should merely relieve a carrier operating in intrastate commerce under a State intrastate certificate from having to obtain a Federal

certificate in order to engage in interstate transportation within the State. In the Coordinator's first motor-carrier bill the criticized definitions of the Rayburn Bill were modified and the forerunner of the present proviso was inserted.

In the course of its passage through Congress the proviso contained the following sentence: "In any such case the Commission shall have no authority to issue any such certificate." This sentence appeared between the two sentences now constituting the proviso, but it was eliminated in the Senate committee report as merely an unnecessary restriction.

It will thus be seen that the legislative history of the bill clearly indicates the intention of Congress to change the original proposal, which was that no jurisdiction should be exercised at all over commerce carried on wholly between two points within a given State, in favor of the proposition that the intrastate operator lawfully operating in intrastate commerce under a certificate of public convenience and necessity issued by a State should have the right to transport passengers and property in interstate commerce between points covered by his intrastate certificate without obtaining a similar certificate from this Commission. It follows that since applicant has not obtained a certificate from the Railroad Commission of Texas authorizing the transportation of property in intrastate commerce within Texas, it has no right to continue operations under the second proviso of section 206(a).

The Commission's interpretation was upheld in *Gulf Coast Motor Freight Lines, Inc.*, v. *United States*, 35 F. Supp. 136 (S.D. Tex. 1940). Significantly, in 1938, the subcommittee of the Committee on Interstate Commerce, United States Senate, heard testimony on a bill, S. 3606, Seventy-fifth Congress, to amend the Interstate Commerce Act. This same

question was again squarely in issue. The proponents of an amendment to make no distinction between intrastate operations and interstate operations conducted wholly within a single State were unsuccessful.

Respondent further contends that the decision of the Supreme Court of Montana in *State* v. *Board of Railroad Commissioners, supra*, should be given full faith and credit. That decision did not attempt to deal with the applicability of the second proviso and need not be considered in that respect. The Montana court stated, however, in determining whether or not respondent was deprived of property without due process of law, that the board attempted to deprive respondent of the right granted to operate as a motor carrier in interstate commerce. The court added that the Motor Carrier Act of 1935 would not affect State interstate certificates granted prior thereto. The Montana court's decision would only be applicable to whatever rights respondent may have under Montana law by virtue of his certificate. The Commission recognizes the right of a State court to interpret State certificates. *Sullivan Transfer & Storage Co.* v. *Neylon*, 66 M.C.C. 348. The Montana Supreme Court, however, has no jurisdiction to determine respondent's rights under the Interstate Commerce Act. Congress has left such determinations to the Commission and to the Federal courts. Cf. *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954); *Service Storage & Transfer Co., Inc.* v. *Virginia*, 359 U.S. 171 (1959).

We find that W. M. Daniels has failed to establish that operations by him in interstate or foreign commerce, corresponding to his certificate issued by the State of Montana, fall within the partial exemption of the second proviso of section 206(a)(1) of the Interstate Commerce Act; and that, therefore, the

statement of intent to operate in interstate or foreign commerce by W. M. Daniels, should be disapproved and rejected.

We further find that W. M. Daniels may not conduct operations, in interstate or foreign commerce, corresponding to his certificate issued by the State of Montana in the absence of appropriate authority from this Commission.

An appropriate order will be entered.

APPENDIX

Interstate permit M.R.C. 284 (reissued)

Pursuant to the provisions of Chapter 310, Revised Codes of Montana, 1935, and the finding heretofore made by the Board that public convenience and necessity require such operations, W. M. Daniels, * * * is hereby authorized to transport property as a common carrier in Interstate service, Class A, by motor vehicles for hire over and on the public highways of the State of Montana, between Missoula, and Helena, Montana; between Missoula and Miles City, Montana, via Butte; and between Butte and Great Falls, Montana, * * *.

U.S. GOVERNMENT PRINTING OFFICE: 1943